

# **EXHIBIT "A"**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CHRISTOPHER GAHR, )  
 ) CV 03-00567 JMS-BMK  
 )  
Plaintiff, ) Honolulu, Hawaii  
 ) January 26, 2007  
vs. ) 3:30 P.M.  
 )  
SECRETARY DEPARTMENT OF )  
HOMELAND SECURITY, ) Plaintiff's Motion for  
 ) Pro Hac Vice  
Defendant. )  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE J. MICHAEL SEABRIGHT  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: G. TODD WITHY  
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Honolulu, HI 96813  
  
MOISES A. AVILES  
Aviles & Associates  
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For the Defendant: THOMAS A. HELPER  
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Official Court Reporter: Debra Kekuna Chun, RPR, CRR  
United States District Court  
300 Ala Moana Blvd. Ste. C285  
Honolulu, HI 96850  
(808) 534-0667

Proceedings recorded by machine shorthand, transcript produced  
with computer-aided transcription (CAT).

1 FRIDAY, JANUARY 26, 2007 3:35 O'CLOCK P.M.

2 THE CLERK: Civil Number 03-00567 JMS, Christopher  
3 Gahr versus Secretary Department of Homeland Security. This  
4 case is called for hearing on Plaintiff's Motion for Pro Hac  
5 Vice.

6 May we have appearances, please.

7 MR. WITHY: G. Todd Withy for the plaintiff Mr. Gahr,  
8 and I am asking to have Mr. Aviles enter his pro hac vice. Mr.  
9 Aviles is on the telephone, I believe.

10 THE COURT: All right. Can you hear us, Mr. Aviles?

11 MR. AVILES: Yes, I can, Your Honor.

12 THE COURT: Mr. Gahr, are you there?

13 THE PLAINTIFF: Yes, I am, sir.

14 THE COURT: And you can hear us okay?

15 THE PLAINTIFF: Yes. That is correct.

16 THE COURT: If either one of you speak, please use  
17 your name first so we know who's speaking.

18 MR. HELPER: Good afternoon, Your Honor. Thomas A.  
19 Helper on behalf of the defendant.

20 THE COURT: Okay. Well, I have received the motion  
21 for appearance pro hac vice. It appears that the technical  
22 requirements are satisfied, which I think none of us thought  
23 would be an issue.

24 And looking at the affidavit Mr. Aviles provided, he  
25 is asking for a continuance of the trial, based on other trials

1 he has set March 6th, March 9th, and March 19th. And, Mr.

2 Aviles, do you have anything to add to what's in your pleading?

3 MR. AVILES: Yes, Your Honor. The only thing I would  
4 like to emphasize is that, if the court is willing to continue  
5 the trial date, then possibly reset dates that are in the  
6 amended pretrial order that I don't have, and my client was  
7 never served with that. I don't want to be part of this  
8 because I think it will hinder my ability to competently  
9 represent Mr. Gahr.

10 THE COURT: All right. Anything else?

11 Anything else, Mr. Aviles?

12 MR. AVILES: No, Your Honor.

13 MR. WITHY: I would like to comment. I haven't yet  
14 seen the -- any kind of amended scheduling order either. We  
15 looked at the -- we're part of the PACER system. We looked on  
16 that. There is no certificate of service nor entry of an  
17 order. I did ask Mr. Helper if there was one. He says there  
18 is. The ones before that were clearly orders and were served;  
19 so I haven't seen that either. And Mr. Aviles hasn't either  
20 because I haven't. So we haven't seen the scheduling order  
21 that would apply to these dates. There were two before. It  
22 was continued twice before for Mr. Green because of his  
23 commitments.

24 THE COURT: Well, there are minutes reflected that  
25 have the dates that are -- if you look carefully on CM-ECF,

1 you'll find it.

2 Mr. Helper.

3 MR. HELPER: Your Honor, at the appropriate time I'd  
4 certainly like to oppose the motion to continue. As the court  
5 said, I don't see a grounds for opposing the motion pro hac  
6 vice.

7 THE COURT: Yes. I think we're beyond the pro hac  
8 vice itself.

9 MR. HELPER: Your Honor, back when Mr. Gahr filed a  
10 motion in front of Magistrate Kurren to continue this matter, I  
11 filed a memorandum that set forth the four factors that the  
12 court looks at to determine whether or not a continuance should  
13 be granted. And I just received the three -- request for a  
14 three-month continuance half an hour ago; so I don't -- the  
15 legal portion of that memo I'd like to simply incorporate by  
16 reference into my argument here and then just to sort of track  
17 the factors that are set forth.

18 The first factor is the plaintiff's diligence. Judge  
19 Kurren has specifically found, I think, that Mr. Gahr was not  
20 diligent and has not been diligent. I think that lack of  
21 diligence continues on through today with his failure to keep  
22 abreast of court deadlines, failure to file things. So I would  
23 simply look at Judge Kurren's order plus the court's own  
24 records over the past couple of weeks for the lack of  
25 diligence. I think that weights strongly against a

1 continuance.

2           The second factor is the prejudice to the other  
3 party. A three-month continuance here would be a substantial  
4 prejudice. I think I want to put on the record what my  
5 understanding is of the court's scheduling system is. As I  
6 understand it --

7           THE COURT: Let me tell you one thing that sort of is  
8 weighing on my mind a little bit here. There appears to be a  
9 criminal case which is set and firm for the same date we're  
10 supposed to start this case right now.

11           MR. HELPER: That was part of the -- for February 13.

12           THE COURT: Yes. Yeah.

13           MR. HELPER: Well --

14           THE COURT: As you know, the Speedy Trial Act --

15           MR. HELPER: Well, that's exactly what I was -- I'm  
16 sorry, Your Honor.

17           THE COURT: No, I was going to say sort of  
18 essentially through its operation tends to discriminate against  
19 civil cases on a constant basis in the sense of we have no  
20 choice but to get to the criminal cases first because of the  
21 Speedy Trial Act. And there's another case I believe the week  
22 or maybe it's two weeks after that that we've been told  
23 likewise. Is that right, Miss Miwa? Is it two weeks after?

24           THE CLERK: Yes.

25           THE COURT: Is going to go. Now, those things change

1 on occasion, but from the representations of counsel it sounds  
2 like those are as firm as these criminal cases get and have  
3 gone through the pretrial conference stage, which is a fairly  
4 good reflection they're serious about going to trial.

5 MR. HELPER: Well, Your Honor, that's certainly new  
6 information, and that's exactly the information that I was  
7 going to say for a setting three months down the road that's  
8 exactly the prejudice the government would suffer. My  
9 understanding the February 13th date was, in fact, a firm one,  
10 but, if it's not, then that does alter the analysis.

11 THE COURT: Well, unfortunately, there is no such  
12 thing as a firm civil trial date. What I'm considering doing,  
13 Mr. Helper, is moving this to mid April, third week in April,  
14 and then working with my criminal calendar as diligently as I  
15 can -- and I promise this to both sides -- as diligently as I  
16 can to make this as firm as possible.

17 MR. HELPER: I do already have a trial set for  
18 April 24th in front of Judge Kay.

19 THE COURT: I think this should take priority.

20 MR. HELPER: Okay.

21 THE COURT: And I can talk to Judge Kay. And he may  
22 not be happy about it, but I was thinking of doing this one  
23 maybe the week before that.

24 MR. HELPER: The week of the 17th.

25 THE COURT: Right.

1           MR. HELPER: Your Honor, I think I still would object  
2 for the record for a continuance based on -- a two-week  
3 continuance on the grounds that I think it does prejudice --  
4 there is still a chance we can hold on to the February 13th  
5 date if the criminal case hasn't or three weeks out here and  
6 they do go away as the court does sometimes.

7           THE COURT: But I think what I might do if I were to  
8 deny this pro hac, I think I might tell you you have to trail,  
9 and that's not a good result for you also because you have  
10 out-of-town witnesses. I mean there is no easy way here  
11 because of these trials I have set to get this case going on  
12 the 13th, it seems to me.

13           MR. HELPER: Your Honor, if -- one way around that is  
14 my out-of-town witnesses could pretty easily appear by video  
15 conference. There's only two or three of them. I think their  
16 testimony is relatively short. If that was granted, then I  
17 don't think trailing would, in fact, be a problem for the  
18 defendant. But, Your Honor, I think other than that I would  
19 simply rest on the brief that I filed with Judge Kurren on this  
20 matter.

21           THE COURT: All right. Thank you.

22           All right. Mr. Withy, let me ask you and Mr. Aviles  
23 a couple questions. If I continue this till sometime around  
24 April 17th, my warning to you and Mr. Aviles would be that this  
25 case will not be continued again, period, absent a criminal



1 trial somehow kicking it. But, like I said, I would make every  
2 effort and I would trail any criminal case that I would have to  
3 do in any event.

4 And so what I need from you and Mr. Aviles is an  
5 assurance for me to accept to go forward in this manner that  
6 you'll be prepared to go forward on April 17th.

7 MR. WITHY: I am Mr. Withy. I am available on that  
8 date and on that week, but I must defer to Mr. Aviles. I will  
9 be available, I will do my best to make sure it goes, but the  
10 the lead counsel in this case at this moment is Mr. Aviles; so  
11 maybe I better let him address it.

12 MR. AVILES: Yes, Your Honor. I'm also available. I  
13 just have a concern with meeting the pretrial scheduling dates.

14 THE COURT: Now, Mr. Aviles, if I grant your motion,  
15 you'd go back to Judge Kurren, and we'd reset those dates.

16 MR. AVILES: Okay. That's fine, then.

17 MR. HELPER: And, Your Honor, it's my understanding  
18 this would be the pretrial dates only, not reopening discovery,  
19 not reopening motions, any of that. Correct?

20 THE COURT: If I grant this motion, Mr. Helper --  
21 which I'm inclined to do, you probably can tell -- what I would  
22 do is vacate the trial date and all pretrial dates associated  
23 with the trial date. I would not open up for motions. I would  
24 not open up for further discovery, unless the parties jointly  
25 agree to it somehow or you file a motion in the normal course

1 as you would. But all of the dates that have passed already,  
2 other than those associated with the trial date, such as  
3 motions in limine, jury instructions, and so forth, all of  
4 those other dates would be cut off.

5 MR. HELPER: Thank you, Your Honor.

6 MR. AVILES: I'm in accordance with that.

7 THE COURT: We cannot hear you, Mr. Aviles.

8 MR. AVILES: Yes. I submit to that -- I agree to  
9 that.

10 THE COURT: All right. So I understand I have a  
11 commitment from you that you will be available for trial on  
12 April 17, 2007.

13 MR. AVILES: Yes.

14 THE COURT: Mr. Withy, the same from you.

15 MR. WITHY: I have that commitment with you, yes.

16 THE COURT: All right. And I can tell you this:  
17 coming in and saying we're not ready isn't going to cut it.  
18 It's not going to work. It simply is not going to happen.

19 So with that understanding, Mr. Aviles, are you  
20 willing to go forward?

21 MR. AVILES: Yes.

22 THE COURT: Mr. Withy.

23 MR. WITHY: Yes, I am.

24 THE COURT: All right.

25 MR. WITHY: Could I ask just to conform. There was a

1 date of February 8th for, I think, motions in limine and your  
2 motion to dismiss. I won't be in town on February 8th, but is  
3 that -- I hope that's going to be taken off calendar, too;  
4 right? I mean motion in limine, just put the hearing back.

5 THE COURT: No, no. Yeah, we have a pretrial  
6 conference before me set, which includes motions in limine, for  
7 the 8th. That will be vacated as well.

8 MR. WITHY: That will be. Okay. Just reset it. I'm  
9 just not going to be here that day. Otherwise, I'm fine with  
10 everything you've said also.

11 THE COURT: And I don't mean to suggest that, if  
12 someone wants to do further discovery, that I'm going to be at  
13 all open to allowing that at this stage. I mean in my event  
14 this is about Mr. Gahr making a decision late, very late, to  
15 bring counsel into the picture.

16 I don't have any question, Mr. Helper, that you're  
17 right under the standards that apply here that I have all the  
18 discretion in the world to deny this motion. I don't think  
19 there's any question about that. But I'm also looking at the  
20 fact that my calendar is very iffy right now in February, I'm  
21 looking at the fact of the prejudice to Mr. Gahr, even though  
22 he was not diligent, and I'm also looking at the fact that I  
23 think we'd have a much smoother trial with counsel. So  
24 weighing all of those considerations, reluctantly -- extremely  
25 reluctantly -- I'm going to grant the motion and vacate all --

1 the trial date, the pretrial conference before me, and all the  
2 dates associated. So I wanted to go through this and make sure  
3 we're on the same page as to what those dates are so there's no  
4 question here. All right. And I will go through it, and I'm  
5 going off of the minutes from the conference.

6 The trial date is vacated. Final pretrial  
7 statements, Mr. Helper, you don't need to file another one, if  
8 you don't want to.

9 MR. HELPER: Your Honor, I think if there's new  
10 deadlines set, I may look at what happens between now and then.  
11 Things may change.

12 THE COURT: I'm vacating the final pretrial statement  
13 date as well. And if you wish to just incorporate something  
14 you previously filed, Mr. Helper, just file something saying  
15 that so I know that's what you're doing.

16 Motions in limine date is vacated along with the  
17 opposition to the motions. Discovery deadline has passed and  
18 will not be reopened. The submission of voir dire, special  
19 verdict form, and concise statement of the case along with jury  
20 instructions, that date is vacated.

21 Now, Mr. Withy, let me tell you one problem I've had  
22 as a judge with attorneys from the mainland who come in, and  
23 that is local attorneys who don't really do what they're  
24 supposed to do under the local rule and just sit back and do  
25 nothing, and then the attorneys understandably sometimes don't

1 know what they have to do under the local rules. I want to  
2 make sure you get a copy of the local rules to Mr. Aviles. A  
3 good example is the requirements to meet and confer on jury  
4 instructions. I expect that sort of thing to be done. I don't  
5 expect anything but full compliance.

6 The final witness lists, that is vacated. The  
7 exchanging of exhibits and demonstrative aids, that is vacated.  
8 Any stipulations for trial, vacated. Filing objections to  
9 exhibits, that date is vacated. The date to file excerpts,  
10 designations, or depositions and the counterdesignations, those  
11 dates are vacated. And any other dates that are not -- I did  
12 not mention are closed. In other words, expert witnesses,  
13 anything of that sort, that should have already been produced  
14 among the parties and that has already been closed is closed  
15 and will not be reopened. Of course, if any party thinks it  
16 should be for some reason, they can file a motion.

17 All right. Now, Mr. Withy, you need to actually  
18 enter an appearance first, I think. Is that right? Before I  
19 can even sign off on the pro hac, it seems to me, because you  
20 haven't made an appearance.

21 MR. WITHY: I hereby enter an appearance as counsel  
22 for plaintiff Christopher Gahr.

23 THE COURT: All right. I will accept that orally but  
24 file a short --

25 MR. WITHY: I have an order attached to our -- to my

1 motion --

2 THE COURT: Does that include you as well?

3 MR. WITHY: -- if that would be appropriate. If it's  
4 not sufficient, then I'll redo it. Do you want a separate  
5 order on the items you just enumerated, or you want to put on  
6 order on that.

7 THE COURT: No, the order admitting him is fine.  
8 It's just it's based on you being part of the case, and you  
9 haven't made an appearance yet.

10 MR. WITHY: Okay.

11 THE COURT: And I don't know technically to be honest  
12 with you if you need to make an appearance. Miss Miwa, do you  
13 know?

14 THE CLERK: I think he needs to, Your Honor.

15 THE COURT: In writing.

16 MR. WITHY: I'll file a notice of appearance and file  
17 it and serve it.

18 THE COURT: Right. But I will accept it orally such  
19 that I can sign off on the pro hac -- the order granting pro  
20 hac.

21 MR. WITHY: Do you want to set a date with Magistrate  
22 Kurren, or should I call his chambers perhaps?

23 THE CLERK: For --

24 MR. WITHY: Well, we need new pretrial dates.

25 THE CLERK: Call Richlyn.

1 THE COURT: Yeah, so please call -- find out from Mr.  
2 Helper dates that are convenient to everybody and get those  
3 dates so you can get a new final pretrial conference.

4 All right. Anything else?

5 MR. HELPER: Your Honor, the case that I have with  
6 Judge Kay in April is McKillip, and we also have a summary  
7 judgment hearing in February on that. It may actually make  
8 sense to push McKillip back given summary judgment motion. The  
9 hearing may change the lay of the land.

10 THE COURT: How old is that case?

11 MR. HELPER: Couple years I would guess. I couldn't  
12 really tell you, but I don't think it's as old as this one.

13 THE COURT: All right. Well, I will let Judge Kay  
14 know what I've done. And if I find out that he's extremely  
15 unhappy for some reason, then we'll get back together and  
16 discuss it further. All right?

17 MR. HELPER: Thank you, Your Honor.

18 THE COURT: All right. Anything further?

19 MR. WITHY: No, Your Honor.

20 MR. AVILES: No, Your Honor.

21 THE COURT: All right. We're in recess.

22 (Court recessed at 3:55 P.M.)

23

24

25

1 COURT REPORTER'S CERTIFICATE

2 I, Debra Kekuna Chun, Official Court Reporter, United  
3 States District Court, District of Hawaii, do hereby certify  
4 that the foregoing is a correct transcript from the record of  
5 proceedings in the above-entitled matter.

6 DATED at Honolulu, Hawaii, April 14, 2007.

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8

/s/ Debra Chun

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DEBRA KEKUNA CHUN

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RPR, CRR

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